



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Tamper Corp.

File: B-235376.2

Date: July 25, 1989

DIGEST

Protest that awardee's bid should have been rejected as nonresponsive is denied where the awardee unequivocally offered to provide the required machine in accordance with the material terms and conditions of the invitation for bids (IFB) and the awardee's descriptive literature showed that its machine complied with the salient characteristics of the IFB.

DECISION

Tamper Corp. protests the award of a contract to Jackson Jordan, Inc., under invitation for bids (IFB) No. DTRS-57-89-B-00007, issued by the Department of Transportation for a vibrator type tamping machine. Tamper asserts that Jackson's bid was nonresponsive because Jackson offered a tamping machine that did not meet all the requirements of the IFB.

We deny the protest.

The IFB set forth salient characteristics that the offered tamping machine had to meet, as well as the intended use of the machine. The IFB also required bidders to submit descriptive literature with their bids to demonstrate compliance with the salient characteristics.

On the bid opening date, March 20, 1989, Transportation received three bids, with Jackson submitting the low bid for its model 3000 tamping machine. Tamper initially complained to Transportation on April 12 that Jackson's model 3000 did not comply with all the salient characteristics listed in the IFB. Transportation reevaluated Jackson's bid and on April 18, notified Tamper that it considered Jackson's bid responsive and intended to award the contract to Jackson. On April 28, Tamper submitted its protest to our Office.

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In its protest Tamper asserts that the machine offered by Jackson does not meet the IFB requirements that it (1) be operated by one person; (2) jack and tamp railway roadbed ballast under switch ties; and (3) perform track lining. In its comments on the agency report, Tamper further asserts that the Jackson model 3000 is not capable of complete switch tamping and does not operate at a vibration frequency of 3,200 vibrations per minute.

As a preliminary matter, Transportation asserts that Tamper knew of its protest basis on April 12, when Tamper was told that Transportation considered Jackson's bid responsive. Transportation thus argues that since Tamper's protest was not filed within 10 working days after April 12, we should dismiss the protest as untimely. See 4 C.F.R. § 21.2(a)(2) (1988).

We disagree. A protester need not protest until it has knowledge that the agency is intending action that is believed to be incorrect or inimical to the protester's interests. Further, a protester need not file a "defensive" protest where an agency has not made a final determination, since a protester may presume that the agency will act properly. Dock Express Contractors, Inc., B-227865.3, Jan. 13, 1988, 88-1 CPD ¶ 23. Here, the record shows that on April 12 Tamper was told that Transportation would review Jackson's bid to insure that it complied with all the salient characteristics of the IFB. It was only on April 18 that Tamper learned that Transportation considered Jackson's bid responsive and intended to award the contract to Jackson. Since Tamper's protest was filed on April 28, that is, within 10 working days of April 18, it is timely. See Harnischfeger Corp., B-224371, Sept. 12, 1986, 86-2 CPD ¶ 296.


Concerning the merits of Tamper's protest, Transportation replies that it reviewed Jackson's bid and the descriptive literature submitted by Jackson and determined that Jackson's offered model 3000 met the salient characteristics set out in the solicitation. Specifically, Transportation reports that as part of its descriptive literature Jackson submitted a first article test report from a contract with DLA under which DLA tested Jackson's model 3000 tamping machine. The salient characteristics for the tamping machine in the DLA contract were essentially identical to those in Transportation's IFB. The first article test report showed that Jackson's model 3000 can be operated by one person, can jack and tamp roadbed ballast under switch and mainline ties and can perform track lining. Additional descriptive literature submitted by Jackson also demonstrated that Jackson's machine could tamp the switch.

Our review of the record further shows that DLA also found that Jackson's machine vibrates at the required 3,200 vibrations per minute.

To be responsive, a bid must represent an unequivocal offer to provide the exact thing called for in the IFB such that acceptance of the bid will bind the contractor in accordance with the solicitation's material terms and conditions. Only where a bidder provides information with its bid that reduces, limits or modifies a solicitation requirement may the bid be rejected as nonresponsive. Oscar Vision Systems, Inc., B-232289, Nov. 7, 1988, 88-2 CPD ¶ 450.

Here, Jackson did not qualify its offer in any way or take exception to any of the requirements of the IFB. Further, while Tamper argues that the machine cannot comply with the salient characteristics of the IFB, the descriptive literature and first article test report clearly show that the Jackson model 3000 tamping machine complies with the disputed salient characteristics. Accordingly, we have no basis to disagree with Transportation that Jackson's bid met all the requirements of the IFB and thus was responsive.

The protest is denied.


James F. Hinchman
General Counsel